SANITARY LEGISLATION.

COURT DECISIONS.

NEW YORK SUPREME COURT—APPELLATE DIVISION—THIRD DEPARTMENT.

County Tuberculosis Hospital—Location—Delegation of Duties of State Commissioner of Health.

PEOPLE ex rel. BUCKBEE *v.* BIGGS. (Jan. 18, 1916.)

The New York law made the State commissioner of health and the local health officer a board to consider objections to a proposed location for a county tuberculosis hospital and to approve or disapprove the location. The court held that service on such a board was a duty which could not be delegated by the State commissioner of health, and that the deputy commissioner of health could not lawfully act as a member of such a board except when he was performing the duties of the commissioner during his absence or inability to act.

In New York it is necessary to comply with the requirements of law relative to notice and hearing before a proposed location for a county tuberculosis hospital is approved.

[156 New York Supplement, 1038.]

WOODWARD, J.: The proceeding brought here for review was instituted by a petition of the board of supervisors of Warren County, requesting the State commissioner of health to fix the date and place for a hearing upon the petition of said board under the provisions of section 319 of the public health law (Consol. Laws, c. 45). By the provisions of section 45 of the county law (Consol. Laws, c. 11) the boards of supervisors of the several counties are authorized by a majority vote to establish county hospitals for the care and treatment of persons suffering from the disease known as tuberculosis, and when any such board has voted to construct such a hospital it is authorized to purchase real property for such purpose and—

(2) to erect all necessary buildings, make all necessary improvements and repairs and alter any existing buildings, for the use of said hospital, provided that the plans for such erection, alteration, or repair shall first be approved by the State commissioner of health.

How this consent of the State commissioner of health is to be obtained is provided by section 319 of the public health law, which declares that—

A hospital, camp, or other establishment for the treatment of patients suffering from the disease known as pulmonary tuberculosis, shall not be established in any town by any person, association, corporation, or municipality except when authorized as provided by this section.

This provision of the statutes went into effect on the 10th day of April, 1909, but prior to that time it had been recognized that the establishing of such hospitals was in the nature of a menace to the people of the locality where they were to be located, and it had been provided that such a hospital or camp for the treatment of the disease should not be—

established in any town by any person, association, corporation, or municipality unless the board of supervisors of the county and the town board of the town shall each adopt a resolution authorizing the establishment thereof and describing the limits of the locality in which the same may be established.

In other words, the legislature recognized the principle of home rule and made the consent of the local authorities necessary to the lawful establishment of such a hospital within the limits of any town in this State, and in construing the statute we should give effect to its letter and spirit. Every man takes his property subject to the rule that he must use it so as not to injure his neighbor by anything in the nature of a menace to health, and recognizing that a tuberculosis hospital or camp is of this character, the legislature has sought to protect the residents of the towns against such an establishment without their consent, where the facts reasonably permit of objection. Finding the original provision unsatisfactory, in 1909 the rule fixed by section 319 of the public health law was put into effect, and the relator objects to a determination made under the petition of the board of supervisors on the grounds that the proceedings have not conformed to the requirements of the statute, and in this contention we believe he is entirely right.

Section 319 of the public health law, after providing that the person, corporation, or municipality desiring to establish such a hospital shall petition the State commissioner of health, setting forth a description of the locality, etc., and requesting the fixing of a date and place where a hearing may be had upon the petition, provides that the State commissioner shall fix a date for such hearing and that—

> A notice of such hearing, specifying the date and place thereof and briefly describing the proposed site for such hospital, camp, or other establishment, shall be mailed to the person, association, corporation, or municipality proposing to establish the same and to the health officer and each member of the board of health of the town in which it is proposed to establish such hospital, camp, or other establishment at least 20 days before the hearing, and also published twice in a local newspaper of the town, or if there is no such paper published therein then in the newspapers of the county designated in pursuance of law to publish the session laws.

It is then further provided that—

> At the "time and place fixed for such hearing the State commissioner of health and the local health officer [who by a previous provision have been constituted a board 'to approve or disapprove the establishment of such hospital'] shall hear the petitioner and any person who desires to be heard in reference to the location of such hospital, camp, or other establishment, and they shall within 30 days after the hearing, if they are able to agree, approve or disapprove of the location thereof and shall notify the person, association, corporation or municipality of their determination."

This determination, if they agree, is made final and conclusive, with a further provision for dealing with the subject in the event of their failing to agree, not necessary to be here considered. While the statute is not clear upon the point of publication, we are of the opinion that the law contemplated a special notice to each member of the board of health of the town and the health officer at least 20 days before the date fixed for the hearing, and a general notice to all of the people of the town by publication. The act provides that at the hearing the "petitioner and any person who desires to be heard in reference to the location" shall be heard, and it would seem to follow that all were entitled to the like length of notice. It is conceded that there was no paper published in the town of Queensbury, Warren County, and it is not disputed that the publication of the notice in two newspapers was not completed 20 days prior to the date of the hearing. It is also to be noted that it does not appear from the record that the two newspapers in which these notices were printed were the newspapers designated by law to publish the session laws, and the record is defective in this regard. However, in the view we take of the matter this need not be the point of decision.

The relator appeared specially at the hearing and objected to the jurisdiction of the board on the grounds, among others, that the board assuming to act at the hearing was not composed of the State commissioner of health and the local health officer; that there was no authority to delegate the powers of the State commissioner of health to any deputy or any other person; that no notice was mailed to each member of the board of health of the town of Queensbury at least 20 days before the hearing, nor was such notice published as required by law. It seems to us that the contention of

the relator is sound, and that the board as constituted at the time of the alleged hearing, on the 23d day of September, 1915, was without jurisdiction to determine the question upon which the right of the petitioners to proceed depended. Looking for the intent of the legislature, we find, in an act to take effect on the 10th day of April, 1909, that a tuberculosis hospital shall not be established "except when authorized as provided by this section." It then provides that the moving party shall petition the State commissioner—

describing the character thereof, stating the county and town in which it is to be located, and describing the site in said town for such proposed hospital, camp, or other establishment, and requesting the commissioner to fix a date and place for a hearing on such petition before the state commissioner of health and the local health officer, who shall constitute a board to approve or disapprove the establishment of such hospital, camp, or other establishment in accordance with such petition. * * * At the time and place fixed for such hearing the State commissioner of health and the local health officer shall hear the petitioner [etc.].

At the time this provision was made there was not provision in the statutes for a deputy commissioner; the commissioner was authorized to appoint such assistants as he might need, and to "designate in writing one of his assistants who shall possess the powers and perform the duties of commissioner of health during his absence or inability to act, or during a vacancy in the office"; but this gave him no powers, except in the absence or inability to act on the part of the commissioner or during a vacancy in the office. We may therefore conclude that, at the time section 319 of the laws of 1909 was enacted, the legislature did not contemplate authorizing the State commissioner of health to substitute a deputy or agent on the board provided for in the section. The language of the statute is, "The State commissioner of health and the local health officer, who shall constitute a board to approve or disapprove the establishment," etc.; and this certainly did not provide that some one designated by the State commissioner of health would do just as well. A discretionary power, requiring the exercise of responsible judgment, was vested by the statute in a board, to consist of the State commissioner and the local health officer, and that board could not be constituted by deputy and the local health officer any more than a board to consist of the governor and a local health officer could be made up of the lieutenant governor, as such, and a local health officer.

This is not a question of whether a deputy may discharge the duties of the chief officer, but whether a board, to be constituted of a particular officer of the State in conjunction with a local officer, may be constituted by the deputy of the State officer and the local officer; and we are of the opinion that it may not. The legislature has pointed out a particular officer to act, not as State commissioner of health, but as a member of a board specially constituted to perform a particular duty. He performs no duty assigned to the State commissioner of health; his only duty is that of a member of a specially created body for a definite purpose. He is selected because he holds the particular office, but his duties are not those of State commissioner of health, but of a member of this board; and a deputy appointed under the provisions of chapter 559 of the laws of 1913, who is to "perform such duties as may be prescribed by the commissioner," is not, and can not be, authorized to perform the duties of this specially constituted board. The commissioner is not authorized to make his assistant a member of the board provided for in section 319 of the public health law; that is another and different office from that of the State commissioner of health, and the rule is well established that in the exercise of a public as well as a private authority, whether it be ministerial or judicial, all the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. (Powell *v.* Tuttle, 3 N. Y., 396, 401.) So we see that the board or the local health officer acting by himself could not gain jurisdiction, and where the duties of the office involve a trust and confidence, or involve judicial powers, there can be no delegation. (Board of

Excise *v.* Sackrider, 35 N. Y., 154, 157; Ontario Knitting Co. *v.* State, 205 N. Y., 409, 416, 98 N. E., 909, and authorities there cited.)

If we are right in the above view, it is unnecessary to determine the other points suggested by the relator; but it seems obvious that where a statute prescribes that certain conditions must be performed in order to give jurisdiction to act there must be a full compliance with the statute, unless there is some legitimate and controlling excuse for nonperformance, as in Walden *v.* City of Jamestown, 178 N. Y., 213, 70 N. E., 466. Here it is conceded that one of the members of the local board of health was not served with notice, though the statute requires that each member shall be so served; but it is urged that this particular member did not care to be served, and was not interested in the matter. But it is not a question of the desires of Julius F. Hicks personally. The law required that each member of the town board of health should have a written notice at least 20 days before the hearing, and whether Mr. Hicks had or had not a personal interest in the matter is of no consequence. As a public officer of the town he was required to have notice, and the board could not get jurisdiction of the subject matter of the petition without some such notice.

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The determination of the persons assuming to act as a board to determine the location of a hospital in the town of Queensbury should be set aside, as having been made without jurisdiction.

Determination annulled, with $50 costs and disbursements. All concur.

PENNSYLVANIA SUPREME COURT.

Trichinosis—Meat Packer Held Liable for Damages for Death Resulting from Eating Pork Containing Trichinæ.

CATANI v. SWIFT & Co. (Oct. 4, 1915.)

A meat packer who sells pork containing trichinæ, the eating of which causes disease, is liable for injury to the consumer even though the pork was purchased from an intermediate dealer.

The fact that meat has been inspected and approved by United States inspectors in accordance with the Federal pure food laws does not relieve the manufacturer from liability for injury to the consumer if the meat is diseased and unwholesome.

A packer who prepares and sells articles of food which are unwholesome, and which cause disease in the consumer, is liable for injury caused by eating the food whether or not the packer knows that it is unwholesome.

[95 Atlantic Reporter, 931.]

FRAZER, J.: This was an action of trespass by plaintiff to recover damages for the death of her husband which resulted from eating unwholesome and diseased pork slaughtered by defendant in the State of Missouri and shipped to its distributing house at the borough of Nanticoke, in this State, and there sold to a dealer and delivered to plaintiff in its original package, which bore the Government stamp showing an inspection by United States inspectors. Plaintiff produced evidence that her husband and other members of the family had eaten the pork and all subsequently became ill, her husband dying a short time later from what the evidence tended to show was trichinosis, a disease resulting from eating meat containing trichinæ, a small parasite or germ which multiplies rapidly and bores through the walls of the intestines, stomach, and muscles of the human body and poisons the system. The trial judge submitted to the jury the questions whether plaintiff's husband died of trichinosis, and, if so, if he contracted the disease from pork sold by defendant and eaten by him. The jury returned a verdict for plaintiff, thus deciding both questions in the affirmative. Judgment non obstante veredicto was, however, subsequently entered for defendant on the ground that the Federal laws having been complied with and the meat inspected by the United States inspectors, and certified to be sound, defendant was not liable, in the absence of negligence in the transportation or handling